STATE OF MICHIGAN

COURT OF APPEALS

F. TIMBERLANE HAMILTON,

Plaintiff-Appellant,

v

BANK ONE NATIONAL ASSOCIATION, HOMECOMINGS FINANCIAL, TCIF, TROTT & TROTT, PC, and HESS, HESS & KMETZ, PC,

Defendants-Appellees.

UNPUBLISHED
April 25, 2006

No. 265062
Kent Circuit Court
LC No. 05-001514-NZ

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of all defendants. We affirm.

We review de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants Bank One and Homecomings moved for summary disposition under MCR 2.116(C)(4), (6), (7), (8), and (10). Defendant TCIF moved for summary disposition under MCR 2.116(C)(4), (6), (7), and (8). Defendant Trott & Trott moved for summary disposition under MCR 2.116(C)(4), (6), (7), and (8). Defendant Hess, Hess & Kmetz moved for summary disposition under MCR 2.116(C)(8) and (10).

A motion for summary disposition under MCR 2.116(C)(4) tests the trial court's subject-matter jurisdiction and is appropriate when a plaintiff has failed to exhaust its administrative remedies. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004). A motion for summary disposition under MCR 2.116(C)(6) is appropriate where another action has been initiated between the same parties involving the same claim. *Fast Air, Inc v Knight*, 235 Mich App 541, 544; 599 NW2d 489 (1999). A motion for summary disposition under MCR 2.116(C)(7) tests whether a claim is barred because of, among other things, release, prior judgment, statute of limitations, or other disposition of the claim before commencement of the action and is appropriate if the moving party is entitled to judgment as a matter of law. *McDowell v Detroit*, 264 Mich App 337, 345-346; 690 NW2d 513 (2004). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings and is appropriate if no factual development could justify the plaintiff's claim for relief. *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). A motion for summary

disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim and is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003).

Regarding the majority of plaintiff's various tort claims against TCIF, summary disposition was proper because they are barred by the statute of limitations. MCL 600.5805(1) and (10) and MCL 600.5827 provide that the period of limitations for an action in tort runs three years from the time the claim accrues. The last date of tortious conduct alleged in plaintiff's complaint is June 6, 2001; therefore, the statute of limitations expired on June 6, 2004. Plaintiff did not file the complaint in this case until February 2005; therefore, the majority of his tort claims are barred by the statute of limitations and the trial court properly granted summary disposition on that basis.

Regarding plaintiff's claim that TCIF is liable in tort for its conduct arising out of the initiation of the foreclosure process, his argument lacks merit. Bank One, as mortgage holder, initiated the foreclosure proceedings, and TCIF cannot be held liable for the alleged tort committed by Bank One. Further, any duty TCIF had toward plaintiff arose out of the mortgage contract between the parties, and the gist of plaintiff's claims is that TCIF did not properly exercise its contractual rights under the mortgage. Because plaintiff has not alleged the violation of a legal duty separate and distinct from the contractual obligation between himself and TCIF, plaintiff's tort claims lack merit. See *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 78-79; 559 NW2d 647 (1997).

Regarding the remainder of plaintiff's claims against TCIF, Bank One, and Homecomings, they are barred by res judicata. Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). A subsequent action is barred when: 1) the first action was decided on the merits, 2) the matter contested in the subsequent action was or could have been resolved in the prior action, and 3) both actions involve the same parties or their privies. *Id*. A voluntary dismissal with prejudice is a final judgment on the merits for res judicata purposes. *Brownridge v Michigan Mut Ins Co*, 115 Mich App 745, 748; 321 NW2d 798 (1982).

In this case, plaintiff's allegations against Bank One, Homecomings, and TCIF are the same as those already raised in state court and bankruptcy court. The gravamen of plaintiff's claims concerning quieting title to the property, setting aside the mortgage, and fraudulent conveyance, is that he has superior title to the property. Plaintiff first filed a complaint in circuit court against Bank One and Homecomings, claiming that he was never in default and that the 2001 foreclosure sale was therefore invalid. Then, plaintiff voluntarily dismissed the complaint so that he could pursue the same claim in bankruptcy court; however, the first bankruptcy proceeding was dismissed due to plaintiff's failure to timely file a bankruptcy plan.

In plaintiff's second bankruptcy case, he filed an adversary proceeding against Bank One and Homecomings. The adversary proceeding asserted essentially the same issues as those raised in the original circuit court proceeding, i.e., whether plaintiff's mortgage was delinquent due to his escrow shortage for unpaid taxes and whether Bank One wrongfully foreclosed. Additionally, plaintiff requested the bankruptcy court to set aside the 2001 foreclosure sale. Plaintiff then entered into the settlement agreement and stipulation specifically consenting to the

execution of an affidavit setting aside the 2001 foreclosure sale and consequently reviving the mortgage.

The settlement agreement signed by plaintiff's attorney and the stipulation signed by plaintiff himself were essential to the dismissal of the adversary proceeding and the voluntary dismissal of the bankruptcy case. Accordingly, res judicata precludes plaintiff's attempt to re-litigate his claims in this case. Indeed, the stipulation specifically released Homecomings, its agents, heirs, successors, and assigns from all claims arising out of the adversary proceeding. The release applies to Bank One as mortgagee/principal, where release of Homecomings as mortgage servicer/agent discharged it from vicarious liability. *Larkin v Otsego Mem Hosp Ass'n*, 207 Mich App 391, 393; 525 NW2d 475 (1994). The release also applies to TCIF as successor to the property, where Bank One transferred its interest in the property to TCIF via quit claim deed.

Plaintiff's argument that the stipulation was procured through fraud lacks merit because neither the settlement agreement nor the stipulation and dismissal order were set aside or appealed by plaintiff. See *Real Estate Exch Corp v Muskegon Co Drain Comm'r*, 304 Mich 596, 610; 8 NW2d 652 (1943) (even though federal court judgment may have been erroneous, "no appeal having been taken from [] the judgment . . . [it is a] final valid order[] of the Federal court which this court is bound to accord full faith and credit"). Plaintiff could have filed another motion to re-open the adversary proceeding as he did the first time he alleged that the settlement agreement signed by his attorney on his behalf was not authorized. Plaintiff's claim of fraud also fails because of other benefits he received as a consequence of the settlement agreement and stipulation in bankruptcy court, i.e., setting aside the foreclosure sale and retaining his property.

After the 2001 foreclosure sale was set aside, plaintiff again defaulted on the mortgage and Bank One became the holder of the sheriff's deed at the 2004 foreclosure sale, subsequently transferring its interest to TCIF via quit claim deed. TCIF then filed summary proceedings in district court because plaintiff held over after the expiration of the redemption period for the 2004 foreclosure. Plaintiff raised the issue whether TCIF was the title holder of the property where the mortgage was extinguished by the 2001 foreclosure sale, notwithstanding his earlier stipulation to set aside that sale and revive the mortgage. The district court disagreed and granted TCIF a judgment of possession. The circuit court affirmed, specifically finding that Bank One rightfully purchased the property following a proper foreclosure sale prompted by plaintiff's default. Thus, plaintiff suffered a ruling on the merits in state court, and because plaintiff now raises the same claims on appeal, they are barred by res judicata.

Although it is difficult to discern, plaintiff also apparently argues that the stipulation is void because it was based on the settlement agreement, which violates the statute of frauds because, although it was in writing, it was only signed by his attorney and not himself. However, plaintiff's attorney signed the settlement agreement on plaintiff's behalf and, as noted above, plaintiff subsequently signed the stipulation, which ratified the terms of the settlement agreement. Accordingly, plaintiff's argument is without merit.

Plaintiff's claims against Trott & Trott, which represented Bank One and Homecomings, are wholly lacking in merit, because Trott & Trott simply owed no duty to plaintiff. Whether a duty exists is a question of law for the court to decide. *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d

900 (2005). A legal malpractice action may generally be brought only by a client who feels that he has been damaged by retained counsel's negligence, and it is a rare circumstance that will permit an attorney's actions affecting a nonclient to give rise to a legitimate suit by a third party. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253-254; 571 NW2d 716 (1997). To properly allege such a claim, plaintiff must establish that a special relationship existed between himself and Bank One and Homecomings such that their interests were merged, thus eliminating the potential for a conflict of interest. *Id*. at 254-255. Here, plaintiff is unable to demonstrate the existence of such a special relationship where his interests were directly adverse to those of Bank One and Homecomings. An attorney does not have a duty of due care to his legal opponent, *Friedman v Dozorc*, 412 Mich 1, 23-26; 312 NW2d 585 (1981), and any placement of trust, confidence, or reliance on Trott & Trott by plaintiff was unreasonable where his interests were adverse to those of Bank One and Homecomings. *Prentis Foundation*, *supra* at 44. Accordingly, plaintiff's claims against Trott & Trott were properly dismissed by the trial court on the basis that the law firm was simply representing its clients.

The trial court also properly granted Trott & Trott's motion for sanctions and costs to be assessed against plaintiff under MCR 2.114(F), MCR 2.625(A)(2), and MCL 600.2591. We review for clear error a trial court's finding that an action is frivolous. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 168; ___ NW2d ___ (2005). Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). MCL 600.2591(3)(iii) provides that "frivolous" means that the party's position was devoid of arguable legal merit. Here, the trial court did not clearly err in its determination that plaintiff's claims against Trott & Trott were devoid of arguable legal merit where the law firm simply had no duty to plaintiff, and in fact had interests that were directly adverse to plaintiff by virtue of its legal representation of Bank One and Homecomings.

Plaintiff's claims against Hess, Hess & Kmetz, which represented plaintiff at the time the settlement agreement was signed on his behalf, were properly dismissed because they simply were not properly pleaded. As noted by the trial court, a review of the complaint reveals that Hess, Hess & Kmetz is not listed as a defendant, and plaintiff failed to make any substantive allegations against the firm, other than a vague discussion of "collusion" with the other defendants. However, this charge only suggested fraud, and plaintiff failed to plead his allegations of fraud with the degree of specificity required by MCR 2.112(B)(1). Indeed, "[g]eneral allegations will not suffice to state a fraud claim," and "mere speculations are not sufficient to overcome a motion for summary disposition." *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Further still, any dissatisfaction plaintiff may have had with Hess, Hess & Kmetz's representation was essentially endorsed by plaintiff when he, represented by new counsel, signed the stipulation which ratified the settlement agreement signed by Hess, Hess & Kmetz on his behalf.

We affirm.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra